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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN H. MARTIN, *et al.*,
Petitioners,

vs.

DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court class action judgment wholly or predominately for money damages may bar the individual claims of absent class members who had minimum contacts with the forum state but who were not provided with an opportunity to "opt out" of the class as required by due process.

PARTIES

A list of all petitioners and respondents is contained in Appendix A.

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PETITION FOR WRIT OF CERTIORARI

John H. Martin, et al., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 24a) is not yet reported. The opinion of the Circuit Court of Jefferson County (App., *infra*, 49a) is unreported.

JURISDICTION

The Supreme Court of Alabama entered its judgment on July 7, 1995. (App., *infra*, 48a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The question presented arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides that "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

This action arose out of an allegedly fraudulent tender offer made by Drummond Company, Inc. and Drummond Coal Sales, Inc. ("Drummond" or the "Drummonds") for shares of stock of Alabama By-Products Corporation ("ABC"). The Drummonds contended, and the trial court and the Supreme Court of Alabama held, that plaintiffs' claims were barred by a prior class action judgment in Delaware, *Hynson v. Drummond*, CV No. 7904 (Del. Ch. 1990). John H. Martin and the other petitioners asserted that pursuant to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the *Hynson* class action judgment, which was wholly for money damages, did not bar their claims as absent class members because they had not been afforded their procedural due process right to opt out of the class.

A. The Tender Offer

In December 1984, the Drummonds made a tender offer of $75.00 per share to acquire all outstanding shares of ABC stock. Pursuant to the tender offer, Drummond acquired ownership of approximately 91% of the ABC shares. Drummond then effected a squeeze-out merger of all the remaining ABC shares. (App., *infra*, 28a). A number of ABC shareholders who did not tender all of their shares dissented from the merger and sought appraisal of their shares in a statutory appraisal proceeding in Delaware. *Neal v. Alabama By-Products Corp.*, CV No. 8282 (Del. Ch. 1985). In that proceeding the fair value of the ABC stock was determined to be $180.67 per share. (App., *infra*, 30a). See *Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991).

B. The *Hynson* Class Action

In January 1985, before the tender offer was concluded, a class action was brought in Delaware against the Drummonds and several of the directors of Drummond and ABC,[1] claiming fraud and breach of fiduciary duty in connection with the tender offer. *Hynson v. Drummond Company, Inc., et al*, CV No. 7904 (Del. Ch. 1990). The class was described as those stockholders who had tendered their ABC shares. In the summer of 1989, Drummond and class counsel for Hynson reached a settlement in principle. Later that year, a Notice of Settlement was mailed to the tendering ABC shareholders. The Notice informed class members that a fairness hearing would be held in the Delaware Chancery Court on February 1, 1990, that the proposed settlement required Drummond to pay $5,000,000 in cash to the plaintiffs (and their attorneys), and that no other relief, legal or equitable, was granted against Drummond. The Notice also provided that class members had the right to appear in Delaware, either in person or through an attorney, to object, and that absent class members who did not appear and object would be barred from later objecting to the settlement. The Notice did not provide the absent class members with an opportunity to opt out of or request exclusion from the class. (App., *infra*, 29a).

On February 1, 1990, Drummond and class counsel for Hynson presented the trial judge with an agreed-upon order certifying the *Hynson* class under Delaware Rules 23(b)(1) and (2). The trial court signed the proposed order on that same day without providing the absent class members with the right to opt out.

Because the Delaware court had merely signed an agreed-upon order regarding the non-opt-out class certification and had

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[1] Each of the defendants in the instant case was named as a defendant in *Hynson*.

not specifically addressed the question of whether that certification was appropriate, the Drummonds went back to the Delaware court, after Martin filed this action, to urge that court to address the question expressly. Rather than appearing in Delaware in opposition and submitting themselves to the jurisdiction of the Delaware court, the plaintiffs elected to pursue their remedies in the Alabama court. The Delaware court made a specific finding that the petitioners had not made an appearance in Delaware. The Delaware court determined that the case had been properly certified previously and that a right to opt out of the litigation was not constitutionally required. *Hynson v. Drummond Coal Co.*, 601 A.2d 579 (Del. Ch. 1991).

C. Course of Proceedings Below

This suit was commenced in January of 1991 by John H. Martin against the Drummonds and several present and former directors of the Drummond companies and ABC. The other plaintiffs subsequently joined Mr. Martin. All of the complaints asserted essentially the same claims, including claims for fraud, coercion and breach of fiduciary duty arising out of the tender offer and the acts or omissions of the officers and directors of Drummond and ABC in connection with the tender offer. The complaints also sought a declaration that the settlement and judgment in *Hynson* did not preclude plaintiffs from bringing their claims for money damages because plaintiffs, who were absent class members, were not given the right to opt out of the class and to bind plaintiffs without giving them that right would violate due process.

The defendants filed a motion for summary judgment on res judicata grounds, and the trial court granted that motion. The plaintiffs appealed to the Supreme Court of Alabama, which affirmed the trial court.

The Alabama Supreme Court concluded that an absent class plaintiff's minimum contacts with the forum can serve as a

constitutionally sufficient substitute for the opt-out right mandated in *Shutts*. The court found that the plaintiffs had minimum contacts with the State of Delaware and that the right to opt out prescribed by *Shutts* therefore was inapplicable. The Alabama court further relied on the fact that the Delaware Supreme Court, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), had held that its courts had the discretion to provide class members with the opportunity to opt out of a (b)(2) class. Here, the plaintiffs had failed to appear in Delaware to request this discretionary right to opt out of the class. Therefore, the court held that, because plaintiffs did not expressly request such an opt-out right, the procedures provided could not be deemed unfair.

The Alabama Supreme Court frankly conceded its confusion over the holding in *Shutts*, stating:

> We are not sure how far *Shutts* and *Shaffer* [*v. Heitner*, 433 U.S. 186 (1977),] reach in this situation; indeed, the United States Supreme Court, as we read *Ticor [Title Insurance Co. v. Brown*, 511 U.S. ___, 114 S. Ct. ___, 128 L.Ed.2d 33 (1994)], seems unsure of the reach of *Shutts*. Clearly, *Shutts* requires, in a class action for monetary damages, opt-out rights for class members who do not have sufficient contacts with the class action forum. . . .

(App., *infra*, 44a-45a) (footnote omitted). The court went on to hold that the plaintiffs had sufficient contacts and that *Shutts*, therefore, did not require a right to opt out of the class.

REASONS FOR GRANTING THE PETITION

The Alabama Supreme Court expressly acknowledged its confusion about the reach of this Court's opinion in *Shutts*. (App., *infra*, 44a-45a). Numerous other federal and state courts have grappled with the issue of whether absent class plaintiffs having minimum contacts with the forum can be bound, consistent with due process, if an express opt-out right is not provided. Several cases in both the federal and state courts have concluded that *Shutts* is a minimum contacts case, while one federal court of appeals has concluded that *Shutts* is a procedural due process case. Moreover, as the court below recognized, this Court's opinion in *Ticor Title Insurance Co. v. Brown*, 511 U.S. ___, 114 S. Ct. 1359, 128 L.Ed.2d 33 (1994), has added to this confusion. (App., *infra*, 44a-45a). The need for guidance from this Court is critical. This case is a timely opportunity to provide that guidance. The decision below is erroneous, and the issue that it addresses is important.

I. The Supreme Court of Alabama's Interpretation of this Court's Opinion in *Phillips Petroleum Co. v. Shutts* Conflicts with the Ninth Circuit's Interpretation and Aggravates the Existing Split of Authority in the Circuit and State Courts.

In *Shutts*, this Court held that in order to bar absent class plaintiffs from later bringing claims wholly or predominately for money damages, the absent class plaintiffs must be afforded certain *procedural* due process rights. These include, at a minimum, providing an absent plaintiff with an opportunity to remove himself from the class by merely executing and returning an opt out or request for exclusion form to the court. 472 U.S. at 812.

The Alabama Supreme Court limited the *Shutts* holding to cases in which the plaintiffs do not have minimum contacts with the class action forum. (App., *infra*, 32a). The Alabama court's

holding conflicts with the decision of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386, 392 (CA9 1992), *cert. granted*, 114 S. Ct. 56 (1993), *cert. dismissed per curiam*, 114 S. Ct. 1359 (1994). In *Ticor*, the Ninth Circuit held that an absent class plaintiff's claim for money damages was not barred by res judicata because that plaintiff had been denied his procedural due process right to opt out of the prior class action.

Circuits other than the Ninth, on the other hand, have misread *Shutts*, finding it to be inapplicable in cases wherein the absent class plaintiffs had minimum contacts with the forum state. For example, in *White v. National Football League*, 41 F.3d 402, 407-08 (CA8 1994), *cert. denied*, 115 S. Ct. 2569 (1995), the Eighth Circuit construed *Shutts* as holding that in class actions due process requires an opt-out right only as to plaintiffs who are beyond the personal jurisdiction of the forum court.[2] In *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (CA3), *cert. denied*, 115 S. Ct. 480 (1994), the Third Circuit held that notice, plus an opportunity to be heard and participate in the litigation, "are sufficient to bind absent class members who had sufficient minimum contacts with the forum".[3] In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (CA2 1992), the Second Circuit opined that "because there is no question that the court has jurisdiction over appellants, *Shutts* is inapposite. Thus, the district court did not abuse its discretion in denying appellants the opportunity to opt out of the class." The highest court of the State of New York also has limited the right to opt

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[2] As the district court found in *White*, that case involved primarily equitable relief. *White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993); *White v. National Football League*, 836 F. Supp. 1458, 1472 (D. Minn. 1993). Moreover, the plaintiffs had voluntarily litigated the merits of the settlement. *White*, 41 F.3d at 408.

[3] See also *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (CA3 1993); *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (CA3), *cert. denied*, 493 U.S. 821 (1989).

out to those absent plaintiffs lacking minimum contacts with the forum. *In the Matter of Colt Industries Shareholder Litigation*, 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1991). In addition, commentators disagree with regard to the proper interpretation of *Shutts*. Some read *Shutts* as rejecting a minimum contacts test,[4] while others view *Shutts* as requiring an opt-out right only in cases where absent class members do not have minimum contacts with the forum state.[5]

Shutts unambiguously holds that absent class action plaintiffs with predominately monetary claims have a procedural due process right to opt out of the class. *Shutts* did not limit that right to absent plaintiffs lacking minimum contacts with the forum. Nonetheless, the Alabama Supreme Court, while expressly acknowledging uncertainty regarding the holding of *Shutts*, substituted a minimum contacts analysis for the procedural due process test of *Shutts*. Moreover, as noted, there is a conflict between the circuits, and this conflict extends to the decisions of the highest courts of at least two states. There is no realistic prospect for resolution of this far-reaching conflict without a decision by this Court.

II. This Case Does Not Present the Circumstances that Caused this Court to Dismiss the Petition for Certiorari in *Ticor Title Insurance Company v. Brown*.

This Court granted a petition for certiorari raising a similar question in *Ticor Title Insurance Company v. Brown*, 114 S. Ct.

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[4] See Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. Davis L. Rev. 871, 885 (1995); 1 H. Newberg and A. Conte, *Newberg on Class Actions*, § 1.16 (3d ed. 1992); Note, *Phillips Petroleum Company v. Shutts, Procedural Due Process, and Absent Class Plaintiffs: Minimum Contacts is Out — Is Individual Notice In?* 13 Hastings Const. L.Q. 817, 833 (1986).

[5] See A. Miller & D. Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum v. Shutts*, 96 Yale L.J. 1, 52 (1986).

56 (1993), but subsequently dismissed the petition as improvidently granted. 114 S. Ct. 1359 (1994)(per curiam). The concerns that motivated that dismissal are not present in this case.

The Court in *Ticor* confronted the question of whether a *federal* court could refuse to enforce a *federal* class action judgment involving money damages, when the class had been certified, pursuant to Rules 23(b)(1) and 23(b)(2) of the *Federal* Rules of Civil Procedure, without affording the absent class members the right to opt out. 114 S. Ct. at 1361. Over the dissent of Justice O'Connor, joined by the Chief Justice and Justice Kennedy, the Court dismissed the petition because it did not wish to reach the constitutional issue when the possibility existed that the class could have been certified properly only under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which Rule provides a right to opt out. 114 S. Ct. at 1361-62.[6] The law of res judicata prevented the Court from reexamining the class certification of the prior class action. 114 S. Ct. at 1361.

In contrast, the issue in this case cannot be resolved on nonconstitutional grounds because the *Hynson* judgment involved a class certified by a Delaware state court pursuant to the Delaware Rules of Civil Procedure. This Court has no authority to decide nonconstitutional questions concerning the application of those Delaware rules. The Delaware court initially certified the *Hynson* class under Delaware rules which do not require opt-out rights for absent class members. After petitioners filed this case, the Drummonds sought and obtained a hearing before the same Delaware court which had issued the *Hynson* judgment, and the Delaware court specifically reaffirmed that the class had been properly certified under the Delaware rules and that no opt-out right was required to bind absent class plaintiffs to the money

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[6] In addition, the parties in *Ticor* had reached a settlement designed to moot the petition. 114 S.Ct. at 1362.

judgment. *Hynson v. Drummond Coal Co.*, 601 A.2d 579 (Del. Ch. 1991). Accordingly, unlike a case involving the federal rules, over which this Court has final interpretive authority, the application of the Delaware rules under these circumstances has been conclusively determined by the Delaware court. This case therefore requires the Court to deal exclusively with the constitutional issue presented.

III. The Decision of the Supreme Court of Alabama Conflicts with this Court's Holding in *Phillips Petroleum Co. v. Shutts*.

The Court held in *Shutts* that "[i]f the forum state wishes to bind an absent plaintiff concerning a claim for money damages . . . it must provide minimum *procedural* due process protection." 472 U.S. at 811-12 (emphasis added). The Court defined such procedural due process protection to include the following:

> In addition, we *hold* that due process requires *at a minimum* that an absent class plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Shutts, 472 U.S. at 812 (emphasis added).[7]

This Court's language in *Shutts* is remarkably clear. The minimum procedural due process protection necessary to bind an absent class plaintiff includes the right to opt out, a right that was indisputably not provided here.

The Alabama Supreme Court misread *Shutts* to require an analysis of the plaintiffs' contacts with Delaware. *Shutts* re-

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[7] The holding in *Shutts* was limited to claims wholly or predominately for money judgments. The judgment in this case was wholly monetary; it provided for the payment of $5,000,000 in cash. No other relief, legal or equitable, was granted.

quires no such analysis. The Court in *Shutts* did not distinguish between absent *resident* class members and absent *non-resident* class members. The distinction made by the Court was between absent *plaintiffs* and absent *defendants*. Some of the class members in *Shutts* undeniably had minimum contacts with the class action forum; some in fact were residents of that forum. The Court made no distinction between the procedural due process rights of those with and those without minimum contacts.

The Court's extensive discussion of personal jurisdiction in *Shutts* was necessitated by the peculiar context in which the constitutional question arose. The defendant, Phillips Petroleum, argued that absent class plaintiffs without minimum contacts could not be bound unless they affirmatively "opted in" to the class. The Court rejected this personal jurisdiction argument as to absent class plaintiffs, holding that because they had fewer burdens than defendants, they could indeed be bound, even absent the minimum contacts that would be required to bind a defendant. The Court held, however, that absent class plaintiffs could only be so bound if they were given procedural due process protections, including the right to opt out. 472 U.S. at 812.

Moreover, a chose in action is a property interest protected by the Constitution. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950). As a matter of fundamental fairness, it is no more appropriate to allow an unknown class representative to control the property interest of a resident absent class plaintiff, than it is to allow him to control the property interest of a plaintiff who has no contacts with the forum. A resident absent class plaintiff has just as much interest in hiring his own lawyer, making the decision to sue or not to sue, determining whether or not to accept a proposed settlement, and exercising his right to a jury trial, as does one with no contacts with the forum.

This Court should grant the petition to resolve the conflict among the lower courts and to correct the error of the Alabama Supreme Court.

IV. The Question Presented is Important.

Shutts was a landmark case regarding the procedural due process protection that must be afforded all absent class plaintiffs. The Court's holding in *Shutts* was unambiguous. However, subsequent cases, including the instant case, have refused to provide that procedural due process protection where the absent class plaintiffs had minimum contacts with the forum. The Alabama Supreme Court, obviously uneasy over the result in this case, has urged this Court to provide guidance in determining the "reach of *Shutts*." Unless this Court provides that guidance, the lower courts will continue to struggle with the holding in *Shutts*.

The decision below also has broad fairness implications. Without further direction from this Court, the constitutional right of an absent class member to opt out of a class will depend entirely on the forum selected by the class representative. If the class action is filed in the Ninth Circuit, a constitutional right to opt out will be afforded absent class members with predominately money claims, including those with minimum contacts with the forum. No such constitutional right will be provided by courts in the States of Alabama and New York, nor by courts in the Second, Third and Eighth Circuits, if the absent class members have minimum contacts. The constitutional rights of absent class members should not be subject to the whim of the named plaintiff in choosing a forum. Either the Constitution affords a right to opt out, or it does not.

Finally, review of the decision below is important because resolution of this issue is critical to the administration of the class action process. If the Court permits the minimum contacts analysis employed by the Alabama court and others to stand, the

implications are enormous. At the commencement of any class action, discovery on an individual basis would be necessary to determine which of potentially hundreds or thousands of absent class members have minimum contacts with the forum. Moreover, a minimum contacts test will inevitably lead to uncertainty in class settlements, as there can be no finality so long as there exists some absent class plaintiff without such contacts. That plaintiff would not be bound and could collaterally attack the class judgment. In light of this potential for endless litigation, the provision of certainty and finality is clearly of no less consequence to defendants than to plaintiffs.[8]

This Court should grant certiorari to review the decision of the court below (i) to decide the important constitutional question presented, (ii) to eliminate the conflict in constitutional interpretation which exists between the lower courts, (iii) to correct the error of the Alabama Supreme Court, and (iv) to provide guidance in the administration of class actions.

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[8] As the Court explained in *Shutts*, the defendant bears some responsibility for safeguarding the interests of the absent class plaintiffs. 472 U.S. at 810. Here, had Drummond desired to achieve the maximum preclusive effect, it could have agreed to provide the absent plaintiffs with an opt-out right.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. North, a member of the Bar of this Court, hereby certify that on this 2nd day of October, 1995, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following:

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